HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 41
on appeal from: [2006] EWCA Civ 633

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

United Utilities Water plc (Appellants)
v.
Environment Agency for England and Wales (Respondents)

Appellate Committee

Lord Hoffmann
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Lawrence West QC
Wendy Outhwaite
(Instructed by Addleshaw Goddard)

Respondents:
David Hart QC
Angus McCullough
(Instructed by Environment Agency)

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United Utilities Water plc (Appellants) *v.* Environment Agency for England and Wales (Respondents)

[2007] UKHL 41

LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Walker of Gestingthorpe and I gratefully adopt his statement of the facts, the relevant legislation and the issues.

2. Regulation 9 of the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973) provides that no person may operate an "installation", as defined in the regulations, without a permit. An installation is defined in regulation 2 as a stationary technical unit "where one or more activities listed in Part 1 of Schedule 1 are carried out." Part 1 lists a large number of activities under various headings, including (in section 5.3 of Chapter 5) "Disposal of Waste other than by Incineration or Landfill". Under this heading, paragraph (a) deals with hazardous waste, paragraph (b) with waste oils and paragraph (c), with which this appeal is concerned, with non-hazardous waste.

3. The activities described in paragraph (c) are —

> "Disposal of non-hazardous waste…by
>
> (i) biological treatment…which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 in [Annex IIA to Council Directive 75/442/EEC]; or

(ii) physico-chemical treatment…which results in final compounds or mixtures which are discarded by any of the [same operations]…"

4. The definition makes it clear that the forms of treatment described in sub-paragraphs (i) and (ii) require a permit only if they result in end products ("final compounds or mixtures") which are discarded. Identical treatment which results in end products which are "recovered", ie put to some use, does not require a permit. The Regulations and the Directive upon which they are based make a clear distinction between disposal or discarding on the one hand and recovery on the other. But the short point in this appeal is whether the production and discarding of the end product must take place within the same installation as the biological or physico-chemical treatment. The appellants say that treatment of non-hazardous waste at an installation which produces an intermediate product which is then transferred to another plant for final treatment and disposal does not fall within the definition. Indeed, they say that this is the plain and obvious meaning of the words.

5. I do not agree. The purpose of the legislation was, among other things, to protect the environment against potential damage from the operations involved in the disposal of non-hazardous waste, including biological or physico-chemical treatment. If one asks why, in that case, the regulations did not simply designate "biological or physico-chemical treatment of non-hazardous waste" as an activity requiring a permit, the answer is that it was necessary to distinguish between such treatment for the purposes of disposal and the same treatment for the purposes of recovery. Hence the qualification introduced by the words "which results in final compounds or mixtures which are discarded…". The exclusion of recovery processes from the permit regime was no doubt part of a policy of encouraging recovery. But exclusion of treatment simply on the ground that the final product for discarding was produced elsewhere could have no rational explanation. In my opinion sub-paragraphs (i) and (ii) mean that the treatment must form part of a process which results in a discarded rather than a recovered product but do not stipulate where that should take place. For those reasons and those given by my noble and learned friend, I would dismiss the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

6. I have had the privilege of considering the speech of my noble and learned friend, Lord Walker of Gestingthorpe, in draft. For the reasons he gives, with which I am in complete agreement, I too would dismiss this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

7. This appeal turns on a single issue as to the correct construction of The Pollution Prevention and Control (England and Wales) Regulations 2000, (SI 2000/1973) ("the Regulations"). The Regulations were made under section 2 of the Pollution Prevention and Control Act 1999 in implementation of the Integrated Pollution Prevention and Control Directive (Council Directive 96/61/EC—"The IPPCD"). As the IPPCD's title suggests (and its recitals confirm), the Regulations cover many diverse operations which raise environmental concerns as to emissions in the air, water and land, including (in Schedule 1, Part 1, Chapter 5) waste management. Chapter 5 implements (largely in language identical to its English text) many provisions in the Waste Framework Directive (Council Directive 75/442/EEC—"the Framework Directive") as it stood in 1996. (The Framework Directive has been amended from time to time over the years and has now been consolidated by Directive 2006/12/EC of the European Parliament and the Council; your Lordships are concerned with the text as amended down to 1996.)

8. The appellant United Utilities Water plc ("United Utilities") is a statutory water undertaker and a sewerage undertaker within the meaning of the Water Industry Act 1991. It provides these services to about 2.9m houses and businesses in the northwest of England. The infrastructure of its undertaking is correspondingly large: over 40,000km of sewers, 599 waste water treatment plants incorporating 70 sludge treatment plants, and the "stand-alone" Shell Green processing plant ("Shell Green").

9. The Environment Agency for England and Wales ("the Agency") is the authority which issues permits required under the relevant part of the Regulations. In 2004 United Utilities started proceedings against the Agency under CPR Part 8 for declaratory relief to the effect that 23 (or failing that 18) of its sewage treatment plants did not require a permit under the Regulations. Seven of these plants were selected, as a case management exercise, as suitable test cases. One of them (Eccles) was conceded by the Agency before trial, and another (Wigan) was conceded by United Utilities in the course of argument in the Court of Appeal. On two more (Blackburn and Dalston) the trial judge decided in favour of United Utilities, the Agency's cross-appeal was dismissed by the Court of Appeal, and there is no further cross-appeal. The House is concerned with the three plants (Bolton, Davyhulme and Widnes) on which United Utilities was unsuccessful in both courts below.

10. The processes involved in the treatment of waste water, and the sites at which these processes are carried out by United Utilities, are fully and clearly described in the judgments of the trial judge (Nelson J [2006] Env LR 32) and the Court of Appeal (Laws LJ, with whom Sir Anthony Clarke MR and Smith LJ concurred [2006] Env LR 42). An abbreviated description is therefore sufficient. "Waste water" is the industry term for the contents of public sewers, which contain a mixture of domestic sewage, trade effluent and (depending on the weather) rainwater run-off. After preliminary treatment to remove large items of waste (such as plastic bags or bits of wood) the waste water receives primary treatment ("de-sludging") during which organic matter settles at the bottom of a large tank, and is removed. The remaining water then receives further treatment which is not now material. The sludge is subjected to three further processes:

(a) thickening, using a gravity belt thickener;

(b) primary and secondary digestion (by slow heating followed by cooling) to reduce the organic and pathological content; and

(c) dewatering (by centrifuge or other mechanical means) to reduce the sludge to "cake" with about 30% solid matter.

Processes (a) and (c) amount to "physico-chemical treatment" for the purposes of section 5.3 in Schedule 1, Part 1 of the Regulations, and (b) amounts to "biological treatment" for those purposes.

11. At Widnes, sludge is treated by thickening but is then transported by road to Warrington (a plant on which no question arises, but which is on the Mersey Valley Sludge Pipeline—"the pipeline"). It receives further treatment at Warrington and is then transported by the pipeline to Shell Green.

12. At Bolton, sludge is treated by thickening and primary digestion; it is then sent to Davyhulme for further treatment and is then transported by the pipeline to Shell Green.

13. At Davyhulme, some sludge is thickened, subjected to primary and secondary digestion, and then transported by the pipeline to Shell Green. Other sludge (from Bolton and elsewhere) joins the stream and has the same destination.

14. Thus Shell Green is the ultimate destination of a huge volume of partially-treated sludge. In order to be pumped through to Shell Green the sludge must at that stage have a water content of about 95%. What happens at Shell Green is described as follows in the agreed statement of facts:

> "At Shell Green, the liquid sludge is received into reception tanks and then transferred to conditioning tanks. In the conditioning tanks, ferric chloride is added to cause coagulation of solids and a polymer is added to flocculate the coagulated particles. The sludge is then fed into one of nine filter presses which reduces its water content to leave a sludge cake. These processes are treatments falling within section 5.3 of Schedule 1 to the [Regulations]. After this stage a decision is taken as to whether the sludge cake will be incinerated (a disposal operation within the meaning of section 5.1 of Schedule 1), land-filled (also a disposal operation, but under section 5.2 of the Schedule) or sent for recovery (not subject to the [Regulations])."

The judge found that about one-third of the sludge treated at Shell Green was incinerated there or sent for landfill, and about two-thirds was recovered, mainly by being spread on agricultural land as fertiliser.

15. Having quoted these references to Chapter 5 in Schedule 1 to the Regulations I must now go to the Regulations in much more detail. But before exploring their intricacies I should draw attention to the very important distinction which Community environmental law makes between "disposal" and "recovery". Disposal means, in colloquial terms, getting rid of rubbish as something worthless—typically by landfill or by incineration. Recovery means making use of it—typically by recycling it in one way or another. The terms in the French text of the Framework Directive ("élimination" and "valorisation") bring out the distinction more vividly. The clear policy of the Framework Directive (since its amendment in 1991) has been to prefer recovery to disposal.

16. Paragraph 9(1) of the Regulations provides, so far as material:

> "No person shall operate an installation . . . except under and to the extent authorised by a permit granted by the regulator."

—that is, in this case, the Agency (regulation 8(2)). "Installation" is defined (regulation 2(1)), so far as material, as:

> "A stationary technical unit where one or more activities listed in Part 1 of Schedule 1 are carried out."

17. The general structure of Chapter 5 is: section 5.1 disposal of waste by incineration; section 5.2 disposal of waste by landfill; section 5.3 disposal of waste other than by incineration or landfill; section 5.4 recovery of waste; and 5.5 the production of fuel from waste. Section 5.3 is in the following terms:

> "(a) The disposal of hazardous waste (other than by incineration or landfill) in a facility with a capacity of more than 10 tonnes per day.
>
> (b) The disposal of waste oils (other than by incineration or landfill) in a facility with a capacity of more than 10 tonnes per day.
>
> (c) Disposal of non-hazardous waste in a facility with a capacity of more than 50 tonnes per day by ?

(i) biological treatment, not being treatment specified in any paragraph other than paragraph D8 of Annex IIA to [the Framework Directive], which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 in that Annex (D8); or

(ii) physico-chemical treatment, not being treatment specified in any paragraph other than paragraph D9 in Annex IIA to [the Framework Directive], which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 in that Annex (for example, evaporation, drying, calcination, etc) (D9)."

It is common ground that in section 5.3(c)(ii) the parenthesis "(for example, evaporation, drying, calcination, etc)" qualifies "physico-chemical treatment" (and not the words which immediately precede the parenthesis).

18. In section 5.3 paragraphs (a) and (b) are easily understood and are not to be in point here. Paragraph (c) is much more opaque, and it lies at the heart of this appeal. The issue of construction is focused on the words in section 5.3(c)(i) and (ii):

> "Treatment . . . which results in final compounds or mixtures which are discarded by means of [any operation of the specified description—in practice, subject to the wrinkle discussed below, some sort of incineration or landfill].

The corresponding French text is:

> "Traitement . . . aboutissant à des composés ou des mélanges qui sont éliminés selon l'un des procédés . . ."

19. The purpose underlying section 5.3(c)—and both sides agree, with varying degrees of enthusiasm, that a purposive construction is needed—cannot be understood without looking at the whole of Annex IIA and Annex IIB to the Framework Directive. Annex IIA lists the operations which (under article 9 of the Framework Directive) may not

be undertaken without a permit from the competent authority designated by the Member State in question (in this case the Agency). All of them are "disposal operations" (in the French text "opérations d'élimination"). Annex IIB lists "recovery operations" ("opérations de valorisation"); item R10 in Annex IIB is "land treatment resulting in benefit to agriculture or ecological improvement."

20. Annex IIA contains fifteen items, D1 to D15. D1 to D7 and D12 are all types of disposal by landfill or specialised methods akin to landfill. D10 and D11 are incineration (on land or at sea). All these activities are methods by which waste is finally disposed of (the English text uses a variant, "discarded"; as already noted, the French text sticks with "sont éliminés"). D8 and D9, by contrast, are activities of treatment which produces a physical result (a product) which is "discarded by means of any of the operations numbered D1 to D12." D13, D14 and D15 refer to ancillary activities (blending, repacking, and temporary storage).

21. The words quoted in the penultimate sentence of the last paragraph are the wording of the 1996 text. If I am right in supposing that D8 and D9 are generically different from the group of activities consisting of D1 to D7 and D10 to D12 (because that group lists activities by which waste is finally disposed of or discarded) then the words quoted ought, one might suppose, to be amended to exclude D8 and D9—to stop them being, as my noble and learned friend Lord Hoffmann put it in the course of counsel's argument, self-referential. How can a product be disposed of, it may be asked, by an operation which results in another physical product which has to be discarded? In fact the text was amended in the 2006 consolidation, but only to remove the element of pure self-reference. As amended D8 still appears to contemplate the possibility that the product of some biological treatment might be discarded by an operation amounting to physico-chemical treatment under D9 (and vice versa). This seems to raise the theoretical possibility of a waste product in perpetual circulation between D8 and D9, without ever reaching a final resting place in landfill (of one sort or another) or by incineration. I have to say that I find this point baffling. But it is not (in either the 1996 or the 2006 version) a point that gives any support to the submission of Mr West QC (for United Utilities) that section 5.3(c) cannot be directed to intermediate treatment activities.

22. This wrinkle is however peripheral to the main argument. Mr West, while accepting that a purposive construction is appropriate, has submitted (and Mr Hart QC for the Agency did not dispute) that this

is not a case where there is any discrepancy between the IPPCD or the Framework Directive and the implementing domestic legislation such as to call for any special *Marleasing* approach to construction (*Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135). Mr West submitted that the plain language of section 5.3(c), and in particular the word "final" which qualifies "compounds or mixtures," was decisive in favour of United Utilities. A product which is to receive further treatment cannot, he submitted, be a final compound or mixture. He asked the House to take heed of the opinion of Advocate General Mischo in *The Scotch Whisky Association v Compagnie Financiere Europeenne de Prises de Participation* (Case C-136/96) [1999] 2 CMLR 229, para 18:

> "It is a fundamental principle of statutory interpretation that words which do not require interpretation, because they are perfectly clear, should not be distorted under pretence of interpretation."

Mr West also referred to *SITA EcoService BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (Case C-116/01) [2004] QB 262. He also placed some reliance on the French text of Annex IIA, D8 and D9.

23. Against that Mr Hart pointed to the absurd consequences which would, in his submission, follow from the appellant's construction. It would mean that no sludge treatment plant would need a permit if its product was moved to another site for further treatment before disposal (even if the whole, and not merely part of the product, was disposed of rather than recovered). Mr Hart argued that the appellant's construction amounted to reading in the words "at once and without more" before "discarded" and that it would be irrational to do so. The purpose of the measure is not only to ensure the environmentally acceptable disposal of the final product of waste management, but also to ensure that the processes by which it is produced are themselves environmentally acceptable.

24. I do not regard this as a case where the language is "perfectly clear". Nor do I derive any real assistance from the French text. By using the participle "aboutissant" it avoids the ugly cumulation of subordinate clauses in the English text ("which results . . . which are discarded") but it is not to my mind any less ambiguous, simply as a matter of language. The ambiguity has to be resolved by the context and

by looking at the scheme and purpose of the Regulations and the Council Directives which they implement.

25. The *SITA* case does not seem to me to assist the appellant either. It concerned the shipment of waste glue and other substances from the Netherlands to Belgium for use in the cement industry by two sequential processes: first burning as fuel in cement kilns, and then production of clinker from the residue for use in cement-making. The Court of Justice's decision that the first operation was decisive for classification purposes turned largely on the inclusion in Annex IIB of head R11 ("use of wastes obtained from any of the operations numbered R1 to R10"). There is no comparable provision applicable in this case. On the contrary, the possible interaction between D8 and D9 suggests that intermediate activities are relevant to the definition of "installation".

26. Much of the difficulty arises from the hidden complexity of that definition. "Installation" is defined in terms of the activity carried on at the site, which appears straightforward enough. But it then becomes apparent that some activities (D8 and D9) are defined, not only in terms of their physical product, but also in terms of the final destination of that product. There is therefore an attractive simplicity about the appellant's suggested construction, which would focus exclusively on what happens on the site in question. But I accept the submission on behalf of the Agency that that would produce irrational results. In my opinion the language of section 5.3(c) has a wider scope. Its compressed form follows the compressed language of Annex IIA to the Framework Directive. But its meaning is to be spelled out, not by reading in something like "at once and without more" to qualify "are discarded," but by looking to the product's eventual destination when it is discarded. The use of the present tense in the two subordinate clauses does not require the coming into existence of the product and its disposal to be simultaneous. Any other reading would be contrary to the clear general policy of preferring recovery to disposal.

27. For these reasons (which are, I think, essentially the same as those of Nelson J and the Court of Appeal) I would dismiss this appeal. I can understand that United Utilities may feel some sense of grievance at the situation. Shell Green is the hub of a centralised system for disposing of a very large volume of sludge, and no doubt it achieves economies of scale by its centralised system. If all its output went for recovery, upstream treatment plants would not need permits under the Regulations and there would, your Lordships were told, be a significant financial benefit for United Utilities. In fact two-thirds of its output

goes for recovery, but United Utilities does not get any proportionate relief or discount on that account (that is the Agency's position as explained in Annex IV, para 4.6 of the official publication Guidance to Water Companies, 5 November 2003). But that is not a matter for your Lordships.

LORD CARSWELL

My Lords,

28. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Walker of Gestingthorpe. For the reasons which he gives, with which I fully agree, I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

29. I have had the privilege of considering the speech of my noble and learned friend, Lord Walker of Gestingthorpe, in draft. For the reasons he gives, with which I am in complete agreement, I too would dismiss this appeal.